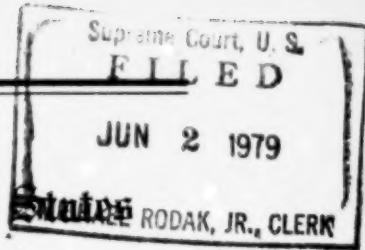

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1804



ERLAND EARL BARTANEN,

Petitioner,

—v.—

STATE OF ARIZONA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARIZONA

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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Erland Earl Bartanen, petitioner, prays that a writ of certiorari issue to review the final judgment and decree of the Arizona Supreme Court affirming petitioner's conviction of five counts of commercial exhibition of obscene films under Arizona Revised Statutes §13-532. The Arizona Supreme Court affirmed the petitioner's conviction on January 30, 1979 and overruled his motion for rehearing on March 6, 1979.

Opinions Below

The opinion of the Arizona Supreme Court, reported at 591 P.2d 546, (Ariz. Supr. Ct. 1979), is set forth in the Appendix, *infra*, at pp. 3a-20a. The order of the Arizona Supreme Court overruling petitioner's motion for rehearing is set forth in the Appendix, *infra*, at p. 1a. The unreported opinions of the Superior Court of Maricopa County, Arizona are set forth in the Appendix, *infra*, at pp. 21a-34a.

Jurisdiction

The judgment of the Arizona Supreme Court affirming petitioner's conviction was entered on January 30, 1979. The Arizona Supreme Court denied the petitioner's motion for rehearing on March 6, 1979.

The jurisdiction of this Court rests on 28 U.S.C. §1257(3).

Question Presented for Review

Does a police officer's affidavit in support of a search warrant for the seizure of films establish probable cause and afford the issuing magistrate an opportunity to focus searchingly on the question of the obscenity of the films, as required by the First, Fourth and Fourteenth Amendments, when it merely indicates, by placement of check marks next to certain categories of sexual conduct included in a pre-printed list, that the films include depictions of sexual conduct and fails to describe any of the films in their entirety?

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment I:

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

United States Constitution, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be vio-

lated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment XIV:

"... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Arizona Revised Statutes, Section 13-531.01, as amended 1974:

"In this article, unless the context otherwise requires:

. . . .

2. An item is obscene within the meaning of this article when:

"(a) The average person, applying contemporary state standards would find that the item, taken as a whole, appeals to the prurient interest; and

"(b) The item depicts or describes, in a patently offensive way, sexual activity as that term is described herein; and

"(c) The item taken as a whole, lacks serious literary, artistic, political or scientific value.

. . . .

6. 'Sadomasochistic abuse' means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition

of being fettered, bound or otherwise physically restrained on the part of one so clothed.

9. 'Sexual activity' means:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation, excretory functions, sado-masochistic abuse and lewd exhibition of the genitals.

"10. 'Ultimate sexual acts' means sexual intercourse, vaginal or anal, fellatio, cunnilingus, bestiality or sodomy. A sexual act is simulated when it depicts explicit sexual activity which gives the appearance of consummation of ultimate sexual acts."

Arizona Revised Statutes, Section 13-532, as amended 1976:

"A person is guilty of a crime who, knowingly:

"1. Prints, copies, manufactures, prepares, produces, or reproduces any obscene item for purposes of sale or commercial distribution.

"2. Publishes, sells, rents, lends, transports in intrastate commerce, or commercially distributes or exhibits any obscene item, or offers to do any such things.

"3. Has in his possession with intent to sell, rent, lend, transport, or commercially distribute any obscene item.

"B. A violation of any provision of subsection A of this section is punishable by a fine of not to exceed five thousand dollars, by imprisonment in a county jail for up to one year or imprisonment in the state prison for not less than one nor more than five years, or both.

"C. If a person has previously been convicted of a violation of this section, or of §13-534, 13-536, 13-536.01 or 13-537, a violation of this section is punishable by a fine of not less than ten thousand dollars, by imprisonment in the state prison for not less than five nor more than ten years, or both."

Statement of the Case

A. Procedural History

On October 26, 1976, an indictment was returned by the Maricopa County, Arizona, grand jury against the petitioner, Erland Bartanen, charging him with five counts of commercial exhibition of obscene films in violation of Arizona Revised Statutes §13-532. A jury trial held in the Superior Court for Maricopa County resulted in a guilty verdict on all counts on June 10, 1977. On September 13, 1977, the trial court sentenced the petitioner to pay a fine of \$5,600.00 for each count, or the aggregate sum of \$28,000.00. In addition, the trial court placed the petitioner on active probation for a period of five years and ordered him to perform 360 hours of public service work. The petitioner's conviction was affirmed on appeal by the Arizona Supreme Court in an opinion filed on January 30, 1979. The petitioner's motion for rehearing was denied by the Arizona Supreme Court on March 6, 1979.

B. Facts Pertinent to the Question Presented

The five charges upon which the petitioner was convicted were based upon five motion picture films seized by officers of the Phoenix Police Department on September 30, 1976, and introduced into evidence against the petitioner. The films were seized from coin-operated booths in the Owl Bookstore, which was owned by the petitioner and which included in its inventory a variety of non-sexual materials (1 Tr. 140).¹

The seizure was effected pursuant to a search warrant which issued on the basis of a pre-printed form affidavit employed by the Phoenix Police Department in obscenity cases. The pre-printed form affidavit provided space for the affiant, a Phoenix police officer, to recite the fact that he had entered the Owl Bookstore on September 30, 1976 to view motion picture films. There followed, on the pre-printed form, a menu of sexual activities from which the affiant could select those depicted in the films he had viewed. Following the affiant's statement that he had viewed "the following described motion picture films," the entire form affidavit, as completed by the affiant in the present case, looked and read as follows:

"A motion picture film entitled

_____, no title, in color,

~~black and white~~, approximately 11 minutes in length, which contained explicit and patently offensive representations or descriptions of ultimate sexual acts involving the following:

- | | |
|------------------------|----------------|
| (√) sexual intercourse | () bestiality |
| (√) fellatio | () sodomy |
| (√) cunnilingus | |

¹ The designation "1 Tr." refers to the transcript of proceedings which occurred on May 24th and 25th, 1977.

and which also contained explicit and patently offensive representations or descriptions of the following:

- | | |
|-------------------------|---------------------------------|
| (√) masturbation | (√) lewd exhibition of genitals |
| (√) excretory functions | (√) sadomasochistic abuse |

and which is further described as follows: The only 8mm color film being displayed in booth #3

A motion picture film entitled

_____, no title, in color,

~~black and white~~, approximately 11 minutes in length, which contained explicit and patently offensive representations or descriptions of ultimate sexual acts involving the following:

- | | |
|------------------------|----------------|
| (√) sexual intercourse | () bestiality |
| (√) fellatio | () sodomy |
| (√) cunnilingus | |

and which also contained explicit and patently offensive representations or descriptions of the following:

- | | |
|-------------------------|---------------------------------|
| (√) masturbation | (√) lewd exhibition of genitals |
| (√) excretory functions | () sadomasochistic abuse |

and which is further described as follows: The
only 8mm color film being displayed in booth #9

"A motion picture film entitled

_____, no title, in color,

~~black and white~~, approximately 11 minutes in length, which contained explicit and patently offensive representations or descriptions of ultimate sexual acts involving the following:

- | | |
|------------------------|----------------|
| (✓) sexual intercourse | () bestiality |
| (✓) fellatio | (✓) sodomy |
| () cunnilingus | |

and which also contained explicit and patently offensive representations or descriptions of the following:

- | | |
|----------------------------|------------------------------------|
| (✓) masturbation | (✓) lewd exhibition
of genitals |
| (✓) excretory
functions | () sadomasochistic
abuse |

and which is further described as follows: The
only 8mm film in color being displayed in booth
#19

A motion picture film entitled _____, no title, in color,
~~black and white~~, approximately 11 minutes in
length, which contained explicit and patently offen-
sive representations or descriptions of ultimate
sexual acts involving the following:

- | | |
|------------------------|----------------|
| (✓) sexual intercourse | () bestiality |
| (✓) fellatio | () sodomy |
| (✓) cunnilingus | |

and which also contained explicit and patently
offensive representations or descriptions of the
following:

- | | |
|----------------------------|------------------------------------|
| (✓) masturbation | (✓) lewd exhibition
of genitals |
| (✓) excretory
functions | () sadomasochistic
abuse |

and which is further described as follows: The
only 8mm film being displayed in booth #11

"A motion picture film entitled _____, no title, in color,

~~black and white~~, approximately 10 minutes in
length, which contained explicit and patently offen-
sive representations or descriptions of ultimate
sexual acts involving the following:

- | | |
|------------------------|----------------|
| () sexual intercourse | () bestiality |
| (✓) fellatio | () sodomy |
| () cunnilingus | |

and which also contained explicit and patently offensive representations or descriptions of the following:

(✓) masturbation	(✓) lewd exhibition of genitals
(✓) excretory functions	() sadomasochistic abuse

and which is further described as follows: The
only 8mm film being displayed in booth #18

"Further, your affiant believes, based upon his personal observation of the above-described motion picture film(s) and based upon his personal experience that the herein-described motion picture film(s) is/are obscene as defined by Section 13-531.01, Arizona Revised Statutes, as amended 1974, that said film(s) was/were used as a means of committing a public offense and constitute(s) evidence tending to show a public offense has been committed, to-wit: a violation of Section 13-532, Arizona Revised Statutes, commercial exhibition of obscene film.

"Further, affiant sayeth not.

/S/ Stephen H. Forrester #2630
OFFICER

Subscribed and sworn to before me this 30th day of September, 1976.

/S/ Benjamin A. Salt
JUDGE OF THE PHOENIX CITY COURT

In the trial court, the petitioner moved to suppress the five films seized from the Owl Bookstore on September 30, 1976, on the ground, *inter alia*, that there was a lack of probable cause for the issuance of the warrant.² That motion was overruled, however, and the films were introduced into evidence and served as the basis of petitioner's conviction on five counts of commercial exhibition of obscene films.

On appeal to the Arizona Supreme Court, the petitioner argued that the trial court had erred in overruling his motion to suppress. The petitioner renewed his argument³ that the affidavit failed to establish probable cause to believe that the films were obscene.⁴ The Arizona Supreme Court rejected this argument, however,⁵ as well as petitioner's other contentions, and affirmed the convictions.

² See Appendix, *infra* at p. 37a.

³ See Appendix, *infra* at pp. 35a-36a.

⁴ There was evidence that the magistrate had viewed the films before he issued the warrant. However, because neither that fact nor the judge's conclusions drawn from viewing the films were reduced to an affidavit, as required by Arizona procedure, the Arizona Supreme Court held that, as a matter of state law, the judge's viewing of the films had to be disregarded and the federal constitutional question decided solely on the basis of the affidavit submitted by police officer Forrester in support of the issuance of a warrant.

⁵ See Appendix, *infra* at pp. 7a-8a.

REASONS FOR GRANTING THE WRIT

AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER THE FIRST, FOURTH AND FOURTEENTH AMENDMENTS ARE VIOLATED BY THE SEIZURE OF A FILM UNDER A SEARCH WARRANT WHICH WAS ISSUED ON THE BASIS OF AN AFFIDAVIT THAT STATES NOTHING MORE THAN THAT THE FILM INCLUDES DEPICTIONS OF SEXUAL CONDUCT.

In *Marcus v. Search Warrants*, 367 U.S. 717 (1961), this Court held unconstitutional a mass seizure of magazines under a warrant which had issued on the strength of a police officer's conclusory allegation, in an affidavit, that the magazines in question were obscene. The seizure had not been preceded by any judicial scrutiny of the materials alleged to be obscene and this Court determined, *inter alia*, that a police officer's conclusory assertion of obscenity is an insufficient basis upon which to order the seizure of expressive material. Rather, in order to assure non-obscene material the protection to which it is entitled, this Court concluded that a seizure of magazines can lawfully be effected only under a procedure "designed to focus searchingly on the question of obscenity." *Id.*, at 367 U.S. 732.

Seven years later, this Court decided *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968). In that case, a police officer submitted an affidavit in support of a search warrant in which he alleged that certain motion picture films were obscene, and that the basis for this conclusion was his having viewed the films. A search warrant issued, the films were seized and later introduced at the petitioner's trial, which resulted in a conviction. This Court reversed, holding that:

"The procedure under which the warrant issued solely upon the conclusory assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officer's conclusions was not a procedure 'designed to focus searchingly on the question of obscenity' [cite omitted], and therefore fell short of constitutional requirements demanding necessary sensitivity to freedom of expression." *Id.*, at 392 U.S. 637.

In *Roaden v. Kentucky*, 413 U.S. 496 (1973), this Court applied the principles enunciated in *Marcus* and *Lee Art Theatre* to a warrantless seizure of a film by a county sheriff which the state of Kentucky attempted to justify as incident to arrest. At 413 U.S. 506, this Court held:

"If, as *Marcus* and *Lee Art Theatre* held, a warrant for seizing allegedly obscene material may not issue on the mere conclusory allegations of an officer, *a fortiori*, the officer may not make such a seizure with no warrant at all."

The clear rule of constitutional law derived from the decisions of this Court summarized above is that a search warrant for the seizure of allegedly obscene material may *not* issue on the strength of a police officer's conclusory assertion, in an affidavit, that the material is obscene. Equally clear is the rule of constitutional law governing cases at the other end of the spectrum. In *Heller v. New York*, 413 U.S. 483 (1973), this Court held that a search warrant for the seizure of allegedly obscene material *may* lawfully issue upon the determination of a neutral and detached magistrate, made after a personal inspection of the material in its entirety, that material is probably obscene.

However, the important and recurring question which has never been resolved by this Court, which ought to be resolved by this Court and which is presented by the instant case, is whether or not a police officer's affidavit in support of a search warrant for the seizure of an allegedly obscene film is sufficient to establish probable cause if it alleges only that the film includes depictions of sexual conduct and fails to describe the contents of the film in its entirety. The state courts and the lower federal courts are constantly faced with this important question and different courts have arrived at inconsistent and conflicting conclusions on this issue. *Compare*, for example, the decision of the Arizona Supreme Court in the present case and the decision of the D.C. Circuit in *United States v. Pryba*, 502 F. 2d 391, 403-404 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1127 (1975) with the decision of the Ninth Circuit in *United States v. Tupler*, 564 F. 2d 1294 (9th Cir. 1977). *See also United States v. Bush*, 582 F. 2d 1016, 1019-1020 (5th Cir. 1978). This case presents the Court with an opportunity to settle this important question.

In the present case, a search warrant for the seizure of films issued on the basis of a form affidavit signed by a police officer that informed the issuing magistrate only that the films in question included depictions of various kinds of sexual conduct. No further description of the films were provided to the magistrate. He was given no information concerning the subject matter of the films; he was not told anything about the themes of the films; he was given no summary of the plots, if any, of the films; none of the characters in the films were described to him; the magistrate was told nothing about the dialogue, if any, contained in the films; he was given no information about

the setting, background or scenery of the films. Nor was the magistrate told anything about the context in which the sexual conduct identified by the affiant was depicted in the films. The magistrate was informed *only* that the films included depictions of sexual conduct. Under these circumstances, the petitioner submits, the magistrate was not given sufficient information upon which to perform his constitutional duty to focus searchingly on the obscenity of the films prior to ordering their seizure.

The test which a magistrate must consider in determining the issue of probable obscenity is the test set forth in *Miller v. California*, 413 U.S. 15, 24 (1973):

“(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest, [citation omitted]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”

Under *Miller*, material may not be suppressed solely because it depicts sexual conduct in a patently offensive way. Rather, such material may be suppressed only if, *taken as a whole*, it *also* appeals to prurient interest *and* lacks serious literary, artistic, political or scientific value.

In the present case, no information was set forth in the affidavit on the basis of which the magistrate could determine whether any of the films, taken as a whole, probably appealed to the prurient interest. Nor was anything set forth in the affidavit on the basis of which the magistrate could determine whether or not the films had

serious value. Indeed, the form affidavit employed in this case failed to provide the magistrate with *any* meaningful review or description of the films in question. The only fact brought to the magistrate's attention by the form affidavit was that the films included depictions of sexual conduct.⁶ But the First Amendment protects material which depicts sexual conduct, unless the material, taken as a whole, also appeals to the prurient interest and lacks serious value. In short, the magistrate simply had insufficient facts before him to focus searchingly on the question of obscenity or to conclude that the films at issue were probably not entitled to the protection of the First Amendment.

Furthermore, by endorsing the affidavit in this case, the Arizona Supreme Court has given its imprimatur to a procedure which is insufficient to protect nonobscene material. There is surely a vast bulk of materials which depicts sexual conduct but which is, nevertheless, entitled to First Amendment protection because it does not appeal to the prurient interest or because it has serious literary, artistic, political, or scientific value. Indeed, it is precisely for that reason that this Court fashioned a *tripartite* test of obscenity in *Miller* and refused to recognize the power of the states to suppress films or publications merely because they depict or describe explicit sexual conduct.

The Arizona Supreme Court's decision in this case, however, permits the seizure of any material which depicts sexual conduct, irrespective of whether it appeals to the prurient interest or has serious value. The decision of the Arizona Supreme Court has, thus, placed in jeopardy

⁶ Even that fact was set forth in an unilluminating and conclusory fashion, for the affiant merely placed check marks next to categories of sexual activity from a pre-printed list.

of seizure a vast quantity of constitutionally protected material.

The question presented by this case is whether a police officer's allegation that a film depicts sexual conduct, without more, presents a magistrate with enough information to focus searchingly on the issue of the obscenity of the film and to order the seizure of it. It is an important question which arises frequently and which has never been decided by this Court. The petitioner submits that this Court ought to accept the opportunity presented by this case to make it clear that, in order to satisfy constitutional requirements, an affidavit for a warrant to seize a film must set forth in a nonconclusory fashion a factual description of the entire contents of the film. Only when a magistrate is presented with a factual recitation of the entire contents of a film can he focus searchingly on the question of the film's obscenity. The petition for a writ of certiorari should be granted and the petitioner's conviction reversed, based, as it is, on evidence seized in violation of the First, Fourth and Fourteenth Amendments. *Marcus, supra*; *Lee Art Theatre, supra*; *Roaden, supra*; *Mapp v. Ohio*, 367 U.S. 643 (1961).

CONCLUSION

For the reasons stated, the petitioner respectfully urges the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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